Filed 4/15/11 In re Mayfield CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re WILLIAM B. MAYFIELD, on Habeas Corpus.	A128142 (Mendocino County Super. Ct. No. SCUK-CRCR 09-93909)

Gary Swarthout, Acting Warden of the California State Prison, Solano, appeals from the superior court's order granting William B. Mayfield's petition for a writ of habeas corpus and ordering the Governor to vacate his decision reversing the Board of Parole Hearings' (Board) decision to grant parole to Mayfield. He contends that the superior court erred in granting the petition because the record demonstrates that some evidence supports the Governor's conclusion that petitioner presents a current risk of danger to the public. We agree and reverse.

I. FACTUAL BACKGROUND

A. The Commitment Offense

In 1985, petitioner was convicted by a jury of the second degree murder of Mark Snyder. The murder occurred on March 12, 1985, when after a night of heavy drinking, petitioner broke into the trailer where Bridget Mayfield, petitioner's estranged wife, was staying and attacked Snyder, a man Bridget was dating. The coroner's testimony indicated that Snyder was in a ducking position with his chin down on his chest when he was shot in the throat. Bridget's testimony at trial was inconsistent with her earlier statements in which she averred that petitioner entered her bedroom, struggled with

Snyder, and then pulled his gun on him, saying "How would you like to get shot?" She told the police that Snyder never reached for his gun. Petitioner was sentenced to 15 years to life in state prison for the murder, plus two years for the use of a firearm, for a total term of 17 years to life in state prison. He has unsuccessfully sought parole numerous times.

B. Summary of Parole History

Since 1995, petitioner has had numerous parole hearings and has filed several petitions for habeas corpus before the superior court. The present appeal stems from petitioner's ninth[1] subsequent hearing which was held on April 23, 2009.[2] The Board granted petitioner parole because the superior court ordered it to do so following petitioner's successful petition for a writ of habeas corpus. The Board, although concluding that petitioner was not suitable for parole, noting that "in all honesty you scare us based on your past conduct and based on statements," found him suitable based on the court order. The Governor, pursuant to his authority to review the Board's

[1] A prisoner is considered for parole for the first time at the initial parole hearing. (Cal. Code Regs., tit. 15, § 2304, subd. (a).) The second parole hearing is referred to as the first subsequent hearing which is followed by the second subsequent hearing, etc. (See Cal. Code Regs., tit. 15, § 2000, subd. (b)(78).)

[2] Litigation concerning petitioner's fifth subsequent parole hearing is currently pending before the Ninth Circuit Court of Appeals. After exhausting his state remedies, petitioner filed a petition for writ of habeas corpus before the United States District Court for the Eastern District of California, Case No. CV-07-346-RHW challenging the Board's decision to deny him parole. On October 6, 2010, the district court granted the writ of habeas corpus, finding that petitioner's due process rights were violated because the Board's determination of parole unsuitability was not supported by any evidence. The district court therefore ordered that the Board "find Petitioner suitable for parole at a hearing to be held within 30 days from the date of this decision . . . ."

Petitioner waived the parole hearing ordered by the district court due to the ongoing litigation in this court, and the Attorney General has appealed the order to the Ninth Circuit. On October 13, 2010, we requested letter briefing on the question of whether the appeal in this matter was now moot. The parties agreed that the appeal was not moot in that the relief sought in the federal district court was waived pending resolution of this appeal.

decision under Penal Code[3] section 3041.2, reversed the Board's decision, finding that petitioner's release would pose an unreasonable risk of danger to society.

Petitioner again petitioned for a writ of habeas corpus in the superior court. The court granted the petition, finding "that there was not some reliable, relevant evidence of current dangerousness on which to support the Governor's reversal of the Board's 2009 decision to grant parole." The Warden appeals the court's order.

II. DISCUSSION

A. Standard of Review

The Board is the administrative agency authorized to grant parole and set release dates. (§§ 3040, 5075, et seq.) Its "decisions are governed by section 3041 and title 15, section [2402] of the California Code of Regulations (Regs., § 2230 et seq.). Pursuant to statute, the Board 'shall normally set a parole release date' one year prior to the inmate's minimum eligible parole release date, and shall set the date 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude *in respect to their threat to the public* . . . .' (§ 3041, subd. (a), italics added.) Subdivision (b) of section 3041 provides that a release date must be set 'unless [the Board] determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the *public safety* requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.' [Citation.] [¶] . . . The Governor's power to review a decision of the Board is set forth in article V, section 8, subdivision (b) of the California Constitution." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1201-1203, fns. omitted (*Lawrence*).)

The relevant inquiry in judicial review of parole decisions is "whether some evidence supports the Governor's ultimate decision that the inmate poses a current risk to

[3] Unless otherwise indicated, all further statutory references are to the Penal Code.

public safety."[4] (*Lawrence, supra,* 44 Cal.4th at p. 1191, fn. 2.) Our Supreme Court recently clarified the proper scope of the "some evidence" standard of review. "[I]n evaluating a parole-suitability determination by either the Board or the Governor, a reviewing court focuses upon 'some evidence' supporting the core statutory determination that a prisoner remains a current threat to public safety—not merely 'some evidence' supporting the Board's or the Governor's characterization of facts contained in the record. Specifically, we explained that, because the paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently poses a threat to public safety, and because the inmate's due process interest in parole mandates a meaningful review of a decision denying parole, the proper articulation of the standard of review is whether there exists 'some evidence' demonstrating that an inmate poses a current threat to public safety, rather than merely some evidence suggesting the existence of a statutory factor of unsuitability." (*In re Prather* (2010) 50 Cal.4th 238, 251-252, quoting *Lawrence, supra,* 44 Cal.4th at p. 1191; see also *In re Shaputis* (2008) 44 Cal.4th 1241, 1254 (*Shaputis*).)

Our review of the record is thus narrowly circumscribed. " '[T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor. . . . It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs

[4] The factors to be considered include "the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release." (Cal. Code Regs., tit. 15, § 2402, subd. (b).) The regulations also list several circumstances tending to show unsuitability for parole including that the commitment offense was committed in an especially heinous, atrocious, or cruel manner; the crime's motive was inexplicable or trivial in relation to the offense; a previous record of violence; a history of unstable or tumultuous relationships with others; sadistic sexual offenses; a history of severe mental problems related to the offense; and serious misconduct in prison. (Cal. Code Regs., tit. 15, § 2402, subd. (c).)

evidence demonstrating unsuitability for parole. As long as the Governor's decision reflects *due consideration of the specified factors* as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision.' " (*Shaputis, supra,* 44 Cal.4th at pp. 1260-1261; quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677, (*Rosenkrantz*), italics added.)

B. Governor's Decision Reversing Board's Decision

Here, the Governor denied parole, concluding that petitioner's release would pose an unreasonable risk of danger to society. He based his decision on a number of factors. He acknowledged several positive factors and gains petitioner has made in prison suggesting his suitability for parole including his educational and vocational pursuits, lack of a prison disciplinary record, participation in self-help and substance abuse programs, and leadership roles in various prison programs. But the Governor remained concerned that petitioner's commitment offense was especially heinous, demonstrating an exceptionally callous disregard for human suffering, that there was evidence of premeditation, and that the motive for the crime was "exceedingly trivial." The Governor also noted that petitioner had not demonstrated sufficient insight or accepted full responsibility for the offense and continued to minimize his actions in the offense. In particular, the Governor observed that petitioner gave several previous versions of the crime, suggesting the shooting was either an accident or done in self-defense, but the evidence showed otherwise.[5] "The fact that [petitioner's] versions of the murder consistently minimize his conduct in the crime indicates that he has not gained sufficient insight into the circumstances of the crime or fully accepted responsibility for his actions. This evidence renders his life offense still relevant to my determination that [petitioner] poses a current, unreasonable risk of danger if released to the public because he cannot ensure that he will not commit similar crimes in the future if he does not completely understand and fully accept responsibility for his criminal conduct."

[5] We believe a more accurate characterization of petitioner's explanations of the crime would be that of "imperfect self-defense," but in either event, the result is the same.

The Governor was also concerned about petitioner's history of violence before the murder and his minimizing of that history, noting that the "most recent mental-health evaluators and Board panels have expressed serious concerns with this issue over the years." He cited petitioner's 2007 mental health evaluator's report as indicating that petitioner had described the assaults on Bridget and on his prior girlfriend as " 'mutual combat.' " In addition, the Governor relied on a mental health evaluation conducted in 2009 (the 2009 evaluation) where the evaluator stated, "[petitioner] minimizes his prior physical aggressiveness towards his wife. It was noted that during the investigation following [petitioner's] arrest, she reported that she had been battered by her husband on numerous occasions." The Governor found that "[t]he fact that [petitioner] also consistently minimizes his significant history of violence against others indicates that he has not gained sufficient insight into or continues to rationalize his prior violent criminal actions. This evidence also renders his prior episodes of aggression still relevant to my determination that [petitioner] poses a current, unreasonable risk of danger if released to the public because he cannot ensure that he will not commit similar violent acts in the future if he does not completely understand and accept full responsibility for his violent conduct or realize the impact that his actions had on other victims."

The Governor relied extensively on the 2009 evaluation in determining that petitioner remains a danger to the public. In particular, the 2009 evaluator noted that petitioner's psychopathy scores demonstrated that petitioner had antisocial difficulties. These elevated scores related to his antisocial behavior as a young adult including the commitment offense. The evaluator also noted significant problems in the areas of prior violence, substance abuse, and relationship instability as a young adult, and current elevated scores regarding " 'his lack of insight, negative attitudes and impulsivity.' " Based on the evaluation, the Governor was concerned that "[petitioner] continues to display many of the characteristics that he possessed at the time he committed the murder [demonstrating] that he has not sufficiently addressed his anti-social tendencies."

Finally, the governor cited the fact that the Board found petitioner suitable for parole only because the superior court ordered it to do so despite its finding that

petitioner continued to pose a danger to the community. In conclusion, the Governor states: "The gravity of the crime and [petitioner's] significant history of violence supports my decision, but I am particularly concerned by the evidence that [petitioner] still minimizes his prior criminal conduct, has not accepted full responsibility for his offense or his history of violence, and that he has not sufficiently addressed his continuing anti-social characteristics. This evidence indicates that [petitioner] still poses a risk of recidivism and violence and that his release from prison at this time would create an unreasonable risk to public safety."

C. Some Evidence Supports the Governor's Decision

Our review of the record confirms that there is some evidence to support the Governor's decision. "[T]he core determination of 'public safety' under the statute and corresponding regulations involves an assessment of an inmate's *current* dangerousness." (*Lawrence*, *supra*, 44 Cal.4th at p. 1205.) In making that assessment, while the Governor may rely upon the circumstances of the commitment offense, "the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Id.* at p. 1214.)

The 2009 evaluation is "some evidence" supporting the Governor's decision that petitioner remains a danger to the public. (*Lawrence, supra,* 44 Cal.4th at p. 1191, fn. 2.) The 2009 evaluation concluded that petitioner presented "a low risk for violence" in the community, but also stated that he was in "the *upper level* of the low range for violent recidivism." (Italics added.) The evaluator also identifies a sufficient number of concerns to suggest the possibility of current dangerousness.

The assessment stated that "[i]n the [c]linical or more current and dynamic domain of risk assessment," although petitioner displays "only a few" of the predictive factors for recidivism, "[h]e had elevated scores regarding his lack of insight, negative attitudes and

impulsivity." In the clinical psychopathy portion of the assessment, he was at the upper level of the low range compared to other offenders, "[scoring] higher than 24% of those offenders." The significant items, based on his antisocial behavior as a young adult include: "Lack of Remorse/Guilt, Callous/Lack of Empathy, Impulsivity, Irresponsibility, Failure to Accept Responsibility for Actions, Revocation of Conditional Release and Poor Behavioral Controls."

The 2009 evaluation also concluded that although petitioner "has gained insight into the severity of his loss of control that resulted from his alcohol and drug dependence . . . . he has not displayed the same degree of insight into the severity of his assaultive behavior toward two of his intimate partners and toward the males who where involved with his wife" and that he "minimizes his prior physical aggressiveness toward his wife." While the evaluator found no mental illness and no current signs of impairment of impulse control, petitioner's "primary treatment need" was "to continue to improve his insight into his history of problems with anger, his problematic relationships with women and his physical assaults related to his relationships." [6]

In *Shaputis, supra,* 44 Cal.4th at p. 1251, a similar second degree murder case, the inmate's most recent psychological assessment also concluded that he was at a low risk of future violence if released. However, as in the case here, there was also evidence that the inmate "remain[ed] a threat to public safety in that he . . . failed to take responsibility for the murder of his wife, and despite years of rehabilitative programming and participation in substance abuse programs . . . failed to gain insight into his previous violent behavior, including the brutal domestic violence inflicted upon his wife and children for many years preceding the commitment offense." (*Id*. at p. 1246; see *In re Lazor* (2009) 172 Cal.App.4th 1185, 1202 [while psychological assessment of inmate's risk of future violence is relevant to his suitability for release, it "does not necessarily

[6] We note that that the psychological evaluation conducted in 2007 reflected similar concerns. That evaluation noted petitioner's characterization of his assaults on Bridget and a prior girlfriend as "mutual combat" and his claim that he shot Snyder "only because he believed [Snyder] would use his gun."

dictate the . . . parole decision."]) Thus, while inmate Shaputis had years of laudatory work in prison and had no disciplinary problems, his crimes, in addition to his lack of insight into his prior violent behavior, are predictive of current dangerousness. (*Shaputis, supra,* 44 Cal.4th at p. 1259.) So too, here. Although petitioner takes a greater degree of responsibility for the crime than did Shaputis and has a lesser degree of prior violent behavior, the record nevertheless contains evidence demonstrating that "the inmate lacks insight into his or her commitment offense or previous acts of violence, even after rehabilitative programming tailored to addressing the issues that led to commission of the offense, [therefore] the aggravated circumstances of the crime reliably may continue to predict current dangerousness even after many years of incarceration." (*Lawrence, supra,* 44 Cal.4th at p. 1228, cf. *In re Rodriguez* (2011) 193 Cal.App.4th 85, 99-101 [inmate's lack of insight into why he allowed his brother (the shooter) to bring a gun not indicative of current dangerousness].)

Petitioner's characterization of his commitment offense as a crime of passion does not alter our conclusion that some evidence supports the Governor's decision. While petitioner states that he "stand[s] solely responsible for [the victim's] death," he has also minimized his offense and his prior violent conduct toward his estranged wife, prior girlfriend, and others. The record reflects that petitioner had a history of physical aggression against Bridget, that he had assaulted Ted Davis, another man acquainted with Bridget, and had committed a battery on a prior girlfriend. Contrary to petitioner's argument, the commitment offense was not an isolated instance, but the culmination of violent behavior toward Bridget and others. (See *Shaputis, supra,* 44 Cal.4th at p. 1259 [murder not simply the result of stress but consequence of many years of the inmate's violent and brutalizing behavior].)

Petitioner also argues that he has taken responsibility for his offense and that with his exemplary prison record, there is no nexus between any alleged discrepancies in his version of the crime and his current dangerousness. Yet the record contains evidence that petitioner has maintained, as recently as August 2007, that he shot Snyder only because he believed Snyder would use his gun and that he has minimized his prior violent

tendencies. Consequently, there is some evidence to support the Governor's conclusion that petitioner continues to lack insight into his offense and his prior violent tendencies. (Cf. *In re Gomez* (2010) 190 Cal.App.4th 1291, 1308 [no evidence that prisoner lacked insight into his commitment offense].)

Petitioner requests that we take judicial notice of several prior psychological evaluations and prior superior court rulings granting his habeas corpus petitions, contending that they support his argument that he has gained insight for his crime. We decline his request. Our review of the Governor's decision "is limited to ascertaining whether there is some evidence in the record that supports [his] decision." (*Rosenkrantz, supra,* 29 Cal.4th at p. 616, 677; see also *Lawrence, supra,* 44 Cal.4th at pp. 1223-1224 [court recognizes that dated psychological assessments lack evidentiary value].)

Petitioner also argues that the Governor relied on unproven allegations that he was abusive toward Bridget and a former girlfriend and committed other aggressive acts. The Governor, however, is required to consider circumstances relating to a petitioner's unsuitability for parole, including a previous record of violence and a history of unstable or tumultuous relationships with others. (See Cal. Code Regs., tit. 15, § 2402, subd. (c).) Here, the probation report details several instances of petitioner's uncharged criminal conduct. The report includes deputy attorney general Eugene W. Kaster's summary of the evidence that was admitted at trial and his statement concerning police reports involving petitioner's uncharged conduct. In particular, the report relates facts of petitioner's assault upon Davis as well as his assaults on Bridget and a former girlfriend. The incident involving Davis also occurred at the trailer where Bridget was living. Davis testified at petitioner's trial that petitioner broke into the trailer, jumped him and assaulted him, and kicked him with his cowboy boots. Petitioner then slapped Bridget several times. He later related to his roommate that he "beat the shit out of a man he found with Bridget." The probation report also includes Kaster's summary of prior police reports involving petitioner – including petitioner's assault upon a prior girlfriend and Bridget's filing of a complaint with the district attorney's office alleging petitioner committed a battery upon her. Contrary to petitioner's argument, the Governor's reliance

on the probation report is not a "one-sided view of the facts" demonstrating bias, and the allegations set forth in the report are not of " 'questionable reliability.' " Rather, the probation report documents testimony at petitioner's trial, as summarized by Kaster, and relates facts contained in police reports that the probation officer substantiated. (See Cal. Rules of Court, rule 4.411.5 (3) [records of an arrest or charge not leading to a conviction may not be included in the probation report unless supported by facts].) This is not a case where prior police contacts were included in a probation report without supporting factual information. (Cf. *People v. Calloway* (1974) 37 Cal.App.3d 905, 908 [inclusion of raw arrest data without supporting factual information is unreliable and prejudicial].) The Governor's consideration of this evidence was not arbitrary or capricious, but rather an application of the matters he was required to assess in making his parole determination. (*Lawrence, supra,* 44 Cal.4th at p. 1205.)

Finally, petitioner's reliance on our Supreme Court's recent decision in *In re Prather, supra,* 50 Cal.4th 238 is misplaced. The *Prather* court was concerned with the proper scope of orders issued to the Board by reviewing courts. Specifically, *Prather* held that a reviewing court may not place limits on the types of evidence the Board should consider in making a parole-suitability determination. (*Id.* at p. 253.) "[I]t is improper for a reviewing court to direct the Board to reach a particular result or to consider only a limited category of evidence in making a suitability determination." (*Ibid.*) The court in *Prather* did not determine the extent to which a court's prior ruling would limit the Governor's authority. Hence, contrary to petitioner's argument, *Prather* does not require that the Governor give "preclusive effect" to four prior judicial determinations granting habeas corpus relief and finding petitioner suitable for parole.

In concluding, we emphasize that the standard of review in these cases sets a very high bar. Once we identify some modicum of evidence to support the Governor's determination of current dangerousness, we can go no further. (*Shaputis, supra,* 44 Cal.4th at pp. 1260-1261.) Whether or not we might have reached a different result based upon our review of the record is irrelevant.

III. DISPOSITION

The superior court order granting petitioner's petition for a writ of habeas corpus is reversed.

_____
RIVERA, J.

We concur:

_____
RUVOLO, P.J.

_____
SEPULVEDA, J.